Filed 7/9/19 P. v. Barba CA5

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

ROBERTO GONZALEZ BARBA,

Defendant and Appellant.

F075442

(Super. Ct. No. VCF333574)

OPINION

APPEAL from a judgment of the Superior Court of Tulare County. Joseph A. Kalashian, Judge. (Retired Judge of the Tulare Sup. Ct. assigned by the Chief Justice pursuant to article VI, § 6 of the Cal. Const.)

Tracy A. Rogers, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Louis M. Vasquez, Lewis A. Martinez, and Amanda D. Cary, Deputy Attorneys General, for Plaintiff and Respondent.

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Roberto Gonzalez Barba was convicted by jury of armed robbery, aggravated assault, unlawful firearm possession, witness dissuasion, and resisting arrest. The

evidence of his guilt was strong. However, the trial court failed to provide the standard jury instruction on reasonable doubt and the presumption of innocence. Additional instructional errors were made, and the central issue on appeal is prejudice. We conclude the errors resulted in a due process violation and the judgment must be reversed. Retrial is permitted on all charges.

FACTUAL AND PROCEDURAL BACKGROUND

On April 1, 2016, two men robbed a clothing store in Dinuba. One of the perpetrators used a revolver to threaten store employees and to smash a glass display case containing gold jewelry. The thieves made off with over $20,000 worth of merchandise.

The gunman attempted to hide his face with a bandana, but one of the employees recognized him as a former classmate. The employee provided Barba's name to police and positively identified him from a photographic lineup. Barba was independently identified by the store owner, who had seen him in the store on prior occasions and recognized him by his "gait" and facial features.

Barba was apprehended during a traffic stop, which involved a brief struggle between him and two arresting officers. While he was in custody, police lawfully obtained a deoxyribonucleic acid (DNA) sample for forensic analysis. The gunman had cut himself while breaking into the display case and left drops of blood inside the store. DNA testing confirmed it was Barba's blood.

Barba was charged with robbery (Pen. Code,[1] § 211; counts 1-4), assault with a firearm (§ 245, subd. (a)(2); counts 5-8), criminal possession of a firearm while wearing a mask (§ 25300, subd. (a); count 9), dissuading a witness by means of force or threats (§ 136.1, subds. (b)(1), (c)(1); count 10), and resisting a peace officer (§ 148, subd. (a)(1); counts 11-12). Counts 1 through 4 included firearm enhancement

[1] Undesignated statutory references are to the Penal Code.

allegations under section 12022.53, subdivision (b). Counts 1 through 8 included firearm enhancement allegations under section 12022.5, subdivision (a)(1).

The case went to trial in January 2017. The prosecution's case-in-chief lasted two days and included the testimony of 12 witnesses. The defense presented no evidence. After being instructed on the law (see Discussion, *post*), the jury deliberated for approximately 15 minutes before recessing for a three-day weekend. Upon reconvening, the jury deliberated for an additional 24 minutes before returning guilty verdicts on all 12 counts and finding the enhancement allegations true. Barba was sentenced to 21 years in prison.

DISCUSSION

Instructional Error

Barba's due process claim is based on the omission of CALCRIM No. 220, which explains the presumption of innocence and the prosecution's burden of proof, and also defines reasonable doubt.[2] The trial court is further alleged to have erred by not instructing jurors pursuant to CALCRIM Nos. 202 ["Note-Taking and Reading Back of Testimony"], 222 ["Evidence"], 223 ["Direct and Circumstantial Evidence: Defined"], 224 ["Circumstantial Evidence: Sufficiency of Evidence"], 225 ["Circumstantial

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[2] CALCRIM No. 220 states: "The fact that a criminal charge has been filed against the defendant[s] is not evidence that the charge is true. You must not be biased against the defendant[s] just because (he/she/they) (has/have) been arrested, charged with a crime, or brought to trial. [¶] A defendant in a criminal case is presumed to be innocent. This presumption requires that the People prove a defendant guilty beyond a reasonable doubt. Whenever I tell you the People must prove something, I mean they must prove it beyond a reasonable doubt [unless I specifically tell you otherwise]. [¶] Proof beyond a reasonable doubt is proof that leaves you with an abiding conviction that the charge is true. The evidence need not eliminate all possible doubt because everything in life is open to some possible or imaginary doubt. [¶] In deciding whether the People have proved their case beyond a reasonable doubt, you must impartially compare and consider all the evidence that was received throughout the entire trial. Unless the evidence proves the defendant[s] guilty beyond a reasonable doubt, (he/she/they) (is/are) entitled to an acquittal and you must find (him/her/them) not guilty."

Evidence: Intent or Mental State"], 226 ["Witnesses"], 332 ["Expert Witness Testimony"], 2622 ["Intimidating a Witness (Pen. Code, § 136.1(a) & (b))"], and 2670 ["Lawful Performance: Peace Officer"]. Barba also faults the trial court for omitting from its oral instructions parts of CALCRIM Nos. 200 ["Duties of Judge and Jury"], 201 ["Do Not Investigate"], and 3550 ["Pre-Deliberation Instructions"].

The People concede that the absence of CALCRIM No. 2622, which identifies the elements of witness dissuasion as alleged in count 10, was reversible error. The People also concede the trial court had a sua sponte duty to instruct pursuant to CALCRIM Nos. 220, 226, and 332, but these errors are alleged to have been harmless. Error is disputed with regard to the omission of CALCRIM Nos. 202, 223-225, and 2670. Because we conclude the acknowledged errors were prejudicial, we do not reach the merits of the disputed claims.

Additional Background

At the beginning of jury selection, the trial court said, "[W]hat I just read to you are merely charging allegations. They're not proof of Mr. Barba's guilt. Whether he's guilty or not guilty of these charges will be [based] on the evidence that's received in this trial."

The trial court later advised the venire as follows: "[I]n our system of justice, anyone charged with a crime is presumed to be not guilty of those charges. And that presumption that the defendant is not guilty remains with him throughout this trial. The only time that presumption would no longer apply is if you believe the evidence has proven him guilty beyond a reasonable doubt. Does everyone understand that? That certainly applies to Mr. Barba. If you're a juror in this case, you have to be able to give him that presumption that he's not guilty of these charges."

One prospective juror was dismissed for a stated inability to honor the presumption of innocence. Afterwards, the trial court discussed the relevant principles: "[A] defendant in a criminal case, Mr. Barba in this case, does not have to prove to you

that he's not guilty. He doesn't have to prove anything, really, because the burden, what we call burden of proof, lies with the prosecution. They're the ones who brought the charges. They're the ones who have to prove it to you beyond a reasonable doubt. Mr. Barba does not have to prove that he's not guilty. … Many times not guilty means not proven."

The quoted statements were the trial court's only remarks during jury selection about the reasonable doubt standard. Although it identified the prosecution's burden, the trial court did not define reasonable doubt. At the conclusion of voir dire, the prosecutor acknowledged the People's burden "to prove this case beyond a reasonable doubt."

As mentioned, the trial court's predeliberation instructions did not include CALCRIM No. 220. However, three instructions referenced the reasonable doubt standard in the context of explaining general legal principles. An instruction given pursuant to CALCRIM No. 315 ["Eyewitness Identification"] stated, in pertinent part, "The People have the burden of proving beyond a reasonable doubt that it was the defendant who committed the crime. If the People have not met this burden, you must find the defendant not guilty." Similarly, while explaining the corpus delicti rule (CALCRIM No. 359), the trial court said, "You may not convict the defendant unless the People have proved his guilt beyond a reasonable doubt." The trial court also recited CALCRIM No. 355 ["Defendant's Right Not to Testify"], which states, "A defendant has an absolute constitutional right not to testify. He may rely on the state of the evidence and argue that the People have failed to prove the charges beyond a reasonable doubt…."

Two instructions on the firearm enhancement allegations (CALCRIM Nos. 3131 & 3146) included the following language: "The People have the burden of proving each allegation beyond a reasonable doubt. If the People have not met this burden, you must find the allegation has not been proved." In addition, the written version of an instruction regarding lesser included offenses (CALCRIM No. 3517) concluded by stating, "Whenever I tell you the People must prove something, I mean they

must prove it beyond a reasonable doubt." The court's oral instructions did not include this advisement.

None of the trial court's instructions defined reasonable doubt or explained the presumption of innocence. In closing argument, the prosecutor acknowledged the People's burden both generally and with respect to each element of the charged offenses. The prosecutor also told the jury, "[P]roof beyond a reasonable doubt is a proof that leaves you with an abiding conviction that the *crime* is true. It leaves you with an abiding conviction that in your heart, after you deliberated, after all of the testimony, all of the evidence that you heard, in your heart you know that a crime was committed and you know who did it." (Italics added.) As we will discuss, the statutory definition of reasonable doubt refers to the truth of the charge, not the crime. (§ 1096.)

Applicable Law

"Under the due process clauses of the Fifth and Fourteenth Amendments, the prosecution must prove a defendant's guilt of a criminal offense beyond a reasonable doubt, and a trial court must so inform the jury." (*People v. Aranda* (2012) 55 Cal.4th 342, 356 (*Aranda*).) Trial courts have a duty to instruct jurors on the presumption of innocence and the prosecution's burden to prove guilt beyond reasonable doubt. (*Id.* at pp. 352-353, citing § 1096 & Evid. Code, § 502.) State law further requires that the jury be instructed on the definition of reasonable doubt. (*Aranda*, at p. 374.) In *Aranda*, the California Supreme Court held that failure to provide a standard pattern instruction on these principles does not constitute structural error. (*Id.* at pp. 363-367.) Put differently, "the error is amenable to harmless error analysis." (*Id.* at p. 363.) Because *Aranda* governs the issues before us, we summarize the opinion and its holdings in detail.

The *Aranda* defendant was charged with murder and active participation in a criminal street gang. The trial court utilized the CALJIC pattern jury instructions but neglected to include CALJIC No. 2.90, which is generally viewed as the substantive

equivalent of CALCRIM No. 220.[3] (*Aranda, supra*, 55 Cal.4th at pp. 349-351.) Despite the omission of CALJIC No. 2.90, nine of the pattern instructions referred to the prosecution's burden of proof beyond a reasonable doubt. (*Id*. at p. 351.) The *Aranda* opinion identifies eight of those instructions (CALJIC Nos. 2.01, 5.15, 8.50, 8.71, 8.72, 8.75, 17.19, & 17.24.2) and notes five of them specifically pertained to the murder charge. (*Aranda*, at p. 351.) Two of the nine instructions, CALJIC Nos. 2.01 and 8.50, discussed how the reasonable doubt standard applied to each fact and/or element alleged by the prosecution.[4]

The jury acquitted the defendant of murder, convicted him of voluntary manslaughter as a lesser included offense, and found him guilty of active participation in a gang. (*Aranda, supra*, 55 Cal.4th at pp. 351-352.) On appeal, the trial court's erroneous failure to instruct on the presumption of innocence and reasonable doubt was initially deemed harmless as to the manslaughter verdict but prejudicial with respect to

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[3] CALJIC No. 2.90 states: "A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt whether [his] [her] guilt is satisfactorily shown, [he] [she] is entitled to a verdict of not guilty. This presumption places upon the People the burden of proving [him] [her] guilty beyond a reasonable doubt. [¶] Reasonable doubt is defined as follows: It is not a mere possible doubt; because everything relating to human affairs is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction of the truth of the charge."

[4] CALJIC No. 2.01 addresses circumstantial evidence and is similar to CALCRIM Nos. 224 and 225. The instruction states, in pertinent part: "[E]ach fact which is essential to complete a set of circumstances necessary to establish the defendant's guilt must be proved beyond a reasonable doubt. In other words, before an inference essential to establish guilt may be found to have been proved beyond a reasonable doubt, each fact or circumstance on which the inference necessarily rests must be proved beyond a reasonable doubt."

CALJIC No. 8.50 explains the difference between murder and manslaughter. It states, in pertinent part: "To establish that a killing is murder [other than felony-murder] and not manslaughter, the burden is on the People to prove beyond a reasonable doubt each of the elements of murder …."

the gang offense. (*Id*. at p. 352.) Upon review by the California Supreme Court, the error was determined to be harmless as to both convictions. (*Id*. at p. 350.) Two dissenting justices opined that reversal was required of the latter conviction. (*Id*. at p. 377 (conc. & dis. opn. of Kennard, J.); *id*. at pp. 377-392 (conc. & dis. opn. of Liu, J.).)

Following a discussion of historical case law, *Aranda* reaffirmed the holding of *People v. Vann* (1974) 12 Cal.3d 220 (*Vann*): "[T]he omission of the standard reasonable doubt instruction will amount to a federal due process violation when the instructions that were given by the court failed to explain that the defendant could not be convicted 'unless each element of the crimes charged was proved to the jurors' satisfaction beyond a reasonable doubt.' " (*Aranda*, *supra*, 55 Cal.4th at p. 358, quoting *Vann* at p. 227.) Applying this standard, the justices unanimously agreed that the failure to provide CALJIC No. 2.90 was not a federal constitutional error in relation to the manslaughter conviction. (*Aranda*, at pp. 358-361; *id*. at p. 377 (conc. & dis. opn. of Kennard, J.); *id*. at p. 378 (conc. & dis. opn. of Liu, J.).) This was because the trial court had "repeatedly referred to the prosecution's burden of proving guilt beyond a reasonable doubt when instructing on the murder charge and its lesser included offenses, clearly and directly connecting the requisite standard of proof to those offenses." (*Id*. at p. 361.) Most importantly, the instructions told jurors they had to find proof of " 'each and every element' " beyond a reasonable doubt. (*Id*. at p. 360.)

Although the trial court had committed state law error by not instructing on the definition of reasonable doubt, the error was deemed harmless under the standard of *People v. Watson* (1956) 46 Cal.2d 818, 837 (*Watson*). Three reasons were given for this conclusion. First, "the jury was not left to guess as to the meaning of reasonable doubt" because the trial court had defined it "when it read CALJIC No. 2.90 to the entire panel of prospective jurors, and repeatedly explained the standard instruction's principles during the three days of jury selection." (*Aranda*, *supra*, 55 Cal.4th at p. 376.) Second, "because neither the prosecutor nor defense counsel referred to the standard of proof

during their closing remarks, nothing in their arguments invited the jury to apply a standard of proof less than beyond a reasonable doubt, or no standard at all." (*Id*. at p. 375.) Third, "the jury did not request clarification of the reasonable doubt principle 'as it surely would have done had it been confused as to the meaning of [that term].' " (*Ibid*.)

With regard to the gang crime, the high court determined the omission of CALJIC No. 2.90 *was* a federal constitutional error. Whereas other instructions had "clearly connected the reasonable doubt standard to the voluntary manslaughter offense[,] [t]he same [could not] be said concerning the count charging defendant with active participation in a criminal street gang …." (*Aranda*, *supra*, 55 Cal.4th at p. 361.) "[N]either the instruction on the elements of that offense nor any other instruction given by the court connected the reasonable doubt standard of proof to that charge." (*Ibid*.) Therefore, "the court's omission of the standard reasonable doubt instruction deprived defendant of his federal constitutional right to due process …." (*Id*. at p. 362.)

After concluding a federal constitutional error had occurred, *Aranda* resolved a conflict among the appellate courts regarding whether such an error requires automatic reversal. (*Aranda*, *supra*, 55 Cal.4th at pp. 363-366.) It does not; "the error is subject to harmless error review." (*Id*. at p. 363.) A reviewing court must apply the standard described in *Chapman v. California* (1967) 386 U.S. 18 (*Chapman*). (*Aranda*, at p. 367.) Although the *Chapman* analysis "typically includes review of the strength of the prosecution's case," such considerations are improper in the context of an omitted reasonable doubt instruction. (*Id.* at pp. 367-368.) "[I]f a reviewing court were to rely on its view of the overwhelming weight of the prosecution's evidence to declare there was no reasonable possibility that the jury based its verdict on a standard of proof less than beyond a reasonable doubt, the court would be in the position of expressing its own idea 'of what a reasonable jury would have done. And when [a court] does that, "the wrong entity judge[s] the defendant guilty." ' " (*Id.* at p. 368, quoting *Sullivan v. Louisiana* (1993) 508 U.S. 275, 281.)

"In sum, a reviewing court applying the *Chapman* standard to determine the prejudicial effect of the erroneous omission of the standard reasonable doubt instruction should evaluate the record as a whole—but not rely upon its view of the overwhelming weight of the evidence supporting the verdict—to assess how the trial court's failure to satisfy its constitutional obligation to instruct on the prosecution's burden of proof beyond a reasonable doubt affected the jury's determination of guilt. If it can be said beyond a reasonable doubt that the jury must have found the defendant's guilt beyond a reasonable doubt, the error is harmless. If the reviewing court cannot draw this conclusion, reversal is required." (*Aranda*, *supra*, 55 Cal.4th at p. 368.)

Analyzing the instructional error in relation to the gang offense, the majority of the *Aranda* court found it harmless "in light of a number of distinct features revealed by the record in [the] case." (*Aranda*, *supra*, 55 Cal.4th at p. 368.) Most important were the "nine instructions in connection with the murder count that, taken together, amply conveyed that the prosecutor must prove beyond a reasonable doubt each element of the murder charge or its lesser included offenses, including the voluntary manslaughter offense of which defendant was convicted, as well as the elements of the street gang and firearm sentencing enhancement allegations associated with that count." (*Id*. at p. 369.) Since there were only two charges, and the prosecution's burden of proving each element of the first offense had been adequately explained, the majority found " 'the most logical response' by the jury to the absence of instruction specifically linking the reasonable doubt standard to the gang offense count would have been to conclude that a guilty verdict on that charge was subject to the same reasonable doubt standard that had been described in the court's instructions on murder, the lesser offenses, and the sentencing allegations." (*Id*. at p. 370.)

The *Aranda* majority also found it significant that "none of the court's instructions at trial referred to a lesser standard of proof such as preponderance of the evidence or clear and convincing evidence." (*Aranda*, *supra*, 55 Cal.4th at p. 369.) It further noted

"that neither the prosecutor nor defense counsel referred to the standard of proof during closing remarks[,] … [so] nothing in counsel's arguments would have misled the jury to believe it should adjudge defendant's guilt of the gang count under a standard of proof less than beyond a reasonable doubt." (*Id*. at p. 370.) Additional weight was given to the trial court's recital of CALJIC No. 2.90 during jury selection and other statements it had made to the venire. (*Id*. at p. 371.)

Despite characterizing the trial court's advisements during jury selection as being "of lesser significance than the instructions given at trial," several paragraphs of the majority opinion were devoted to those circumstances. (*Aranda*, *supra*, 55 Cal.4th at pp. 371-373.) In his dissent, Justice Liu disagreed with the majority's reliance on the "pre-empanelment" proceedings. (*Id*. at pp. 386-387 (conc. & dis. opn. of Liu, J.); see *id.* at p. 383 ["No court has put much stock in pre-empanelment instructions, even when they repeatedly mention the reasonable doubt standard, because prospective jurors who do not know whether they will actually serve on a jury cannot realistically be thought to pay focused attention to the trial court's instructions …."].) The majority described how the trial court had "repeatedly explained the connection between the charged crimes and the reasonable doubt standard" over a three-day period, and thus "undertook extensive effort during jury selection to impress upon the prospective jurors the meaning, application, and magnitude of the beyond-a-reasonable-doubt standard of proof, and it painstakingly elicited from the prospective jurors their understanding and acceptance of that principle." (*Id*. at p. 372.) Accordingly, and based on the totality of the circumstances, the majority was certain "the jury's verdict on the gang offense charge must have been based on a finding of guilt beyond a reasonable doubt." (*Id*. at p. 374.)

Analysis

Our analysis will focus on the trial court's failure to instruct the jury pursuant to CALCRIM No. 220. The People argue the error was neither of a constitutional magnitude nor prejudicial. We disagree with both arguments.

By omitting CALCRIM No. 220 from its predeliberation instructions, the trial court failed to instruct on the presumption of innocence, which is a federal constitutional error. (*Aranda*, *supra*, 55 Cal.4th at pp. 355-356.) In *Aranda*, the trial court's failure to explain the presumption of innocence by using a standard reasonable doubt instruction was cured by its use of CALJIC No. 1.00, which states (in relevant part): "[Y]ou must determine what facts have been proved from the evidence received in the trial and not from any other source…. [¶] … You must not be biased against a defendant because [he] [she] has been arrested for this offense, charged with a crime, or brought to trial. None of these circumstances is evidence of guilt and you must not infer or assume from any or all of them that a defendant is more likely to be guilty than not guilty." The quoted language was held to adequately convey "the substance of the presumption of innocence," and to thus "satisfy the dictates of due process." (*Aranda*, at pp. 355-356.)

The trial court below explained the presumption of innocence during jury selection, but that did not cure the error of failing to so instruct at the predeliberation stage. (*Aranda*, *supra*, 55 Cal.4th at p. 362, fn. 11.) A judge's remarks during jury selection are given consideration in a prejudice analysis, but they are not relevant to the question of error. (*Ibid*.) The People concede this point but argue the trial court's error was cured by its use of CALCRIM No. 200, which the Attorney General describes as "the corollary to" CALJIC No. 1.00. The problem with this argument is CALCRIM No. 200 does not contain the same directive as CALJIC No. 1.00 in terms of not harboring bias against a defendant because he or she has been arrested, charged, and/or brought to trial.[5] The reason such language does not appear in CALCRIM No. 200 is

[5] The relevant portion of CALCRIM No. 200 states: "You must decide what the facts are. It is up to all of you, and you alone, to decide what happened, based only on the evidence that has been presented to you in this trial. [¶] Do not let bias, sympathy, prejudice, or public opinion influence your decision. Bias includes, but is not limited to, bias for or against the witnesses, attorneys, defendant[s] or alleged victim[s], based on disability, gender, nationality, national origin, race or ethnicity, religion, gender identity,

because the admonishment is part of CALCRIM No. 220. (See fn. 2, *ante* ["You must not be biased against the defendant[s] just because (he/she/they) (has/have) been arrested, charged with a crime, or brought to trial."].)

Relevant to CALCRIM No. 200, the trial court's oral instructions said, "You must decide what the facts are. It's up to all of you and you alone to decide what happened based only on the evidence that was presented to you in this trial. Do not let bias, sympathy, prejudice, or public opinion influence your decision." The written instructions contained CALCRIM No. 200's definition of bias (see fn. 5, *ante*), but neither version told jurors not to consider the fact of Barba's arrest or that he had been brought to trial, which *Aranda* found to be the key component of CALJIC No. 1.00. (*Aranda, supra,* 55 Cal.4th at p. 356.) Therefore, the trial court's instructional error must be assessed for prejudice under the *Chapman* standard. (See *Aranda,* at p. 356; cf., *People v. Hawthorne* (1992) 4 Cal.4th 43, 71-73 [trial court's omission of CALJIC No. 1.00 not a federal constitutional error in light of other instructions given, which included CALJIC No. 2.90, i.e., the standard reasonable doubt instruction].)

The trial court's omission of CALCRIM No. 220 also qualifies as federal constitutional error because, unlike in *Aranda*, none of the other instructions "clearly and directly" connected the reasonable doubt standard to the charged offenses (*Aranda, supra*, 55 Cal.4th at p. 361) nor explained the People's burden with regard to " 'each and every element' " of those crimes (*id*. at p. 360). In this case, five instructions referenced the reasonable doubt standard, but only in the context of explaining general legal principles (CALCRIM Nos. 315, 355, & 359) and the determination of firearm enhancement allegations (CALCRIM Nos. 3131 & 3146). A sixth written instruction (CALCRIM No. 3517) identified the People's burden in relation to lesser included

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sexual orientation, age, [or] socioeconomic status (./,) [or <insert any other impermissible basis for bias as appropriate>.]"

offenses. Thus, the error is indistinguishable from the one held to constitute a due process violation in *Aranda*.

A state law error occurred when the trial court failed to define reasonable doubt. (*Aranda*, *supra*, 55 Cal.4th at p. 374.) The prosecutor attempted to paraphrase section 1096 during closing argument, but even a verbatim recital of the statute or of CALCRIM No. 220 would not have cured the error.[6] (See *Vann*, *supra*, 12 Cal.3d at p. 227, fn. 6 [accurate statements of the law by counsel in closing argument "did not cure the error of the court's omission."].) While the error is subject to review under the *Watson* standard, it is factored into our *Chapman* analysis as part of the totality of the circumstances. (See *Aranda*, at p. 367 ["The reviewing court conducting a harmless error analysis under *Chapman* looks to the 'whole record' to evaluate the error's effect on the jury's verdict."].)

On the question of prejudice, we are mindful of this caveat in *Aranda*: "The trial court's failure to instruct the jury on the prosecution's burden of proving guilt beyond a reasonable doubt is a serious error that often may amount to a federal due process violation. As demonstrated by the prior decisions, in those instances in which this instructional omission constitutes error of federal constitutional dimension, the error frequently will not be harmless under the *Chapman* harmless error standard of review." (*Aranda*, *supra*, 55 Cal.4th at p. 373.) It follows that a harmless error determination will

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[6] In relevant part, section 1096 states: "Reasonable doubt is defined as follows: 'It is not a mere possible doubt; because everything relating to human affairs is open to some possible or imaginary doubt. It is that state of the case, which, after the entire comparison and consideration of all the evidence, leaves the minds of jurors in that condition that they cannot say they feel an abiding conviction of the truth of the charge.' "

CALCRIM No. 220 simplifies the statutory definition: "Proof beyond a reasonable doubt is proof that leaves you with an abiding conviction that the charge is true. The evidence need not eliminate all possible doubt because everything in life is open to some possible or imaginary doubt."

require facts and circumstances highly analogous to those in *Aranda*. This case differs from *Aranda* in several material respects.

In *Aranda*, the instructional error relating to the gang offense was deemed harmless primarily because the trial court had connected the reasonable doubt standard to each element of the murder/manslaughter charge. (*Aranda*, *supra*, 55 Cal.4th at pp. 360-361, 369-370.) It was thus reasonable to assume the jurors had inferred the same burden of proof applied to the gang charge. (*Id*. at pp. 369-370.) Barba was charged with committing five different crimes, and *none* of the instructions for those offenses explained the People's burden to prove each element of the offense beyond a reasonable doubt. The jurors were not even instructed on the elements of dissuading a witness, which the People concede was prejudicial in and of itself.

Isolated references to the reasonable doubt standard are insufficient to explain that the People's burden of proof applies to each element of the charged crimes, at least without "additional instructions on the meaning of that phrase." (*Vann*, *supra*, 12 Cal.3d at p. 227; see *id*. at pp. 226–228 [reversal based on failure to provide standard reasonable doubt instruction].) The closest the trial court came to linking the applicable standard to each element of the charged offenses was its use of CALCRIM No. 3517, which instructs jurors on how to use verdict forms associated with lesser included offenses. The last sentence of this two-page instruction says, "Whenever I tell you the People must prove something, I mean they must prove it beyond a reasonable doubt." The same language is found in CALCRIM No. 220, but the context is entirely different.

CALCRIM No. 220 is one of the first instructions given and it explains the presumption of innocence and reasonable doubt standard in relation to the People's entire case. CALCRIM No. 3517 is one of the last instructions given and starts out by saying, "If all of you find that the defendant is not guilty of a greater crime …." The instruction is not logically read as connecting the reasonable doubt standard to each element of the charged offenses. (See *Aranda*, *supra*, 55 Cal.4th at p. 359 ["it cannot be presumed 'that

a reasonable doubt instruction given in a *specific* context … will necessarily be understood by all of the jurors to apply *generally* to their determination of the defendant's guilt on the charged offenses."], quoting *People v. Flores* (2007) 147 Cal.App.4th 199, 216.)

Furthermore, the relevant portion of CALCRIM No. 3517 was omitted from the trial court's oral instructions. Barba cites *People v. Murillo* (1996) 47 Cal.App.4th 1104, which holds that where a requested instruction is given only in writing, it is not possible to determine if jurors actually read it and a reviewing court may assume they did not. (*Id.* at p. 1107.) In general, it is assumed jurors are "guided" by the written instructions, which "govern in any conflict with those delivered orally." (*People v. Osband* (1996) 13 Cal.4th 622, 687, 717.) Insofar as the jury below may be presumed to have read all 39 pages of the written instructions, there is evidence to rebut the presumption: (1) the brevity of its deliberations and (2) its verdicts on the charged offenses. Given how quickly it found Barba guilty as charged, it is unlikely the jury paid much attention, if any, to instructions concerning the lesser included offenses. We also note CALCRIM No. 3517 was the second-to-last instruction in the packet.

The People's attempt to analogize the trial court's advisements during jury selection to those given in *Aranda* also falls short. Again, such remarks are "of lesser significance than the instructions given at trial." (*Aranda*, *supra*, 55 Cal.4th at p. 371.) Whereas the jury selection in *Aranda* went on for three days, jury selection in Barba's case lasted just over 45 minutes, not including a 20-minute recess. The *Aranda* judge read CALJIC No. 2.90 to the venire, which included the definition of reasonable doubt, and "repeatedly explained the standard instruction's principles." (*Aranda*, at p. 376.) The trial court in this case did not read CALCRIM No. 220 or a substantive equivalent. Moreover, despite highlighting the presumption of innocence, the trial court did not define reasonable doubt or explain the connection between the reasonable doubt standard and the elements of the charged offenses. (Cf. *Aranda*, at pp. 371-372.)

In *Aranda*, "neither the prosecutor nor defense counsel referred to the standard of proof during closing remarks." (*Aranda*, *supra*, 55 Cal.4th at p. 370.) Therefore, the jurors' understanding of the term "reasonable doubt" was most likely based on the accurate definition provided by the trial court during jury selection. (*Id*. at pp. 371, 376.) Here, the trial court never defined reasonable doubt, so the jury was left to rely upon its own interpretations and/or the prosecutor's inaccurate paraphrasing of section 1096. Either way, we cannot be confident that the jury understood the legal meaning of reasonable doubt. (See *Aranda*, at p. 383 (conc. & dis. opn. of Liu, J.) ["No court has found much relevance in statements of counsel, given the obvious authority of the trial judge in the courtroom."].) Viewing the record as a whole, we cannot say this case is sufficiently analogous to *Aranda* and thus conclude the trial court's instructional errors were prejudicial. The remedy is reversal of the judgment. (*Vann*, *supra*, 12 Cal.3d at p. 228; *People v. Goodwillie* (2007) 147 Cal.App.4th 695, 736 ["federal constitutional error requires reversal unless the People can prove that the error was harmless beyond a reasonable doubt."].)

Sufficiency of the Evidence

When a judgment is reversed for instructional error, retrial is permitted. (*People v. Hallock* (1989) 208 Cal.App.3d 595, 607.) Stated another way, "where the evidence offered by the State and admitted by the trial court—whether erroneously or not—would have been sufficient to sustain a guilty verdict, the Double Jeopardy Clause does not preclude retrial." (*Lockhart v. Nelson* (1988) 488 U.S. 33, 34; accord, *People v. Eroshevich* (2014) 60 Cal.4th 583, 590-591; *People v. Story* (2009) 45 Cal.4th 1282, 1296-1297.) Here, the sufficiency of the evidence is manifest. Barba's only challenge in that regard concerns the crime of dissuading a witness, and his argument is without merit.

"In resolving claims involving the sufficiency of evidence, a reviewing court must determine 'whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime

beyond a reasonable doubt.' " (*People v. Marshall* (1997) 15 Cal.4th 1, 34.) "The supporting evidence must be substantial, that is, 'evidence that "reasonably inspires confidence and is of 'solid value.' " ' " (*Ibid*.) We "presume in support of the judgment the existence of every fact the jury could reasonably have deduced from the evidence." (*People v. Zamudio* (2008) 43 Cal.4th 327, 357.)

Count 10 was pleaded in the alternative by reference to section 136.1, subdivisions (a) and (b). The relevant provision is subdivision (b)(1), which prohibits any attempt to prevent or dissuade a victim or other witness to a crime from "[m]aking any report of that victimization to any peace officer or state or local law enforcement officer …." Barba contends, without elaboration, that there was "no evidence" of his actual or attempted dissuasion of a witness within the meaning of section 136.1. The People appropriately highlight the evidence of Barba brandishing a firearm while telling the store owner "not to touch the alarm that would call the police." Since the evidence was sufficient to support the guilty verdict on count 10 and all of his remaining convictions, Barba is subject to retrial.

Mooted Issues

Barba separately complains of defective verdict forms, alleged ineffective assistance of counsel, the trial court's failure to apply section 654 to count 9 (another issue conceded by the People), and miscellaneous errors in the court's minutes. In supplemental briefing, he alleges sentencing error based on the recent case of *People v. Dueñas* (2019) 30 Cal.App.5th 1157. Given our reversal of the judgment, these claims are moot and require no further discussion.

DISPOSITION

The judgment is reversed.

_____
SNAUFFER, J.

WE CONCUR:

_____
MEEHAN, Acting P.J.

_____
DE SANTOS, J.